

AUG 25 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MIGUEL DIAZ-CORTEZ,

Defendant - Appellant.

No. 05-50694

D.C. No. CR-04-02840-JTM

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted August 21, 2006**

Before: GOODWIN, REINHARDT, and BEA, Circuit Judges.

Miguel Diaz-Cortez appeals from his conviction by jury trial and his sentence for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Diaz-Cortez first contends that insufficient evidence supports his conviction

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

because the prosecution failed to establish that Diaz-Cortez was physically present at a prior deportation proceeding. The Government, however, does not have to prove physical presence in order to establish a § 1326 violation. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 837 (1987); *see also United States v. Alvarado-Delgado*, 98 F.3d 492, 493 (9th Cir. 1996) (en banc).

We further reject Diaz-Cortez's contentions that he was entitled to a jury instruction that, under § 1326, the element of deportation requires both that Diaz-Cortez was physically present at a hearing and that an immigration judge entered a final order of deportation against him. *See Alvarado-Delgado*, 98 F.3d at 493 (holding that lawfulness of the predicate deportation is not an element of the § 1326 offense and therefore a defendant is not entitled to have that issue determined by a jury).

In addition, we hold that the district court's use of Diaz-Cortez's prior aggravated felony conviction to enhance his sentence did not violate his Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). It is well-settled under *Apprendi* and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that the fact of a prior conviction does not need to be alleged in an indictment, submitted to a jury or proved beyond a reasonable doubt. *See, e.g., United States v. Weiland*, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005).

AFFIRMED.